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June 3, 2016

Honorable Vernon S. Broderick
United States District Court for the
Southern District of New York
Thurgood Marshall
United States Courthouse
40 Foley Square
New York, NY 10007

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Re: *Wims v. River Park Residences, LP et al*, 15-CV-04269

Dear Judge Broderick:

I write on behalf of Plaintiff Sean Wims in response to the pre-motion letter of DHCR seeking dismissal of Plaintiff's claims against it. At the outset, the court should bear in mind that Plaintiff and Defendants CVR and River Park have reached an agreement in principle to resolve this matter and are working together to arrange for the prospective and retroactive restoration of Plaintiff's Section 8 rent subsidy. Plaintiff respectfully suggests that adjudicating the defenses raised by DHCR at this juncture may not be an optimal use of the court's time and resources.

DHCR is a necessary party in this litigation.

With respect to DHCR's claim that it is not a proper or necessary party to this action, the court may recollect that at the conference of December 4, 2015, Defendant CVR stated that it lacked the authority to issue retroactive subsidy payments without the approval of DHCR, and therefore suggested that DHCR be joined as a party to ensure the complete resolution of the parties' claims. Rule 19(a) of the Federal Rules of Civil Procedure provide that an absent party may be joined where in its absence "complete relief cannot be accorded among those already parties." *See, Viacom Intern., Inc. v. Kearney*, 212 F.3d 721, 724 (2d Cir. 2000). In *M.G. v. New York City Dept. of Educ.*, 15 F.Supp.3d 296, 306 (S.D.N.Y. 2014), for example, the court ordered joinder of the N.Y.S. Department of Education where the City department did not have control over state policies. Here, although at this early pre-discovery stage of litigation, the extent of DHCR's control over CVR's voucher program is unclear, CVR has asserted that it lacks authority to fully resolve Plaintiff's claims, and its assertion is supported by the provisions of DHCR's Section 8 Administrative Plan, which states that

> In the implementation of the Section 8 Housing Choice Voucher (HCV) Program, HCR acts as the Public Housing Agency (PHA) for all local programs under its purview. In this capacity as PHA, HCR has full responsibility for the satisfactory completion of all contractual obligations with HUD. The Section 8 tenant-based assistance programs are federally funded and administered for the State of New York by HCR through its Statewide Section 8 Voucher Program Office.

See, http://www.nyshcr.org/Publications/Section8AdminPlan/AdminPlan_intro.pdf.

The Administrative Plan further provides:

> In order to effectively and efficiently implement the program over its entire Statewide jurisdiction, HCR has contracted with Local Administrators (LAs) to undertake necessary field activities. Day-to-day responsibility for local administration of the HCV Program in the field is assumed by each LA in its designated local area of operation. The divisions of responsibilities are detailed in a contract between HCR and each of its LAs.

Joinder is also permitted under Rule 19 where "the absence of [a] party will leave the existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." *See, Davidson Well Drilling, Ltd. v. Bristol-Myers Squibb Co.*, 2009 WL 2135396 (S.D.N.Y. 2009). Here, CVR has raised the possibility that it could be ordered to pay subsidy monies in this litigation which DHCR might find to be in violation of its obligations as a subcontractor in the Section 8 program. Therefore, whether or not Plaintiff has alleged causes of action directly against DHCR, the agency remains a proper and necessary party to this litigation, at least until discovery further clarifies the mutual relationships and obligations of the parties.

Plaintiff has a private right of action under the Housing Act.

Contrary to DHCR's argument, provisions of the Housing Act may be enforceable through an implied private right of action or through 42 U.S.C. § 1983. *See Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 423-29 (1987); *Johnson v. Housing Authority of Jefferson Parish*, 442 F.3d 356 (5th Cir. 2006) (finding rights under voucher programs to be enforceable through § 1983). Additionally, federal regulations that "define the scope" of rights created within their enabling statute may be enforced through § 1983. *D.D. ex rel. V.D. v. New York City Bd. of Educ*., 465 F.3d 503, 513 (2d Cir. 2006); *Wright*, 479 U.S. at 431-32.

The cases cited by DHCR largely concern HUD's failure to enforce provisions of the Housing Act governing Section 8 housing quality standards. Their conclusions about the lack of private rights of action are specific to these Housing Act provisions and are not as broad as DHCR portrays them. Not one of them analyzes tenants' rights of action to enforce § 1437f(t) or § 1437d(k), the two provisions at issue in this action. The cases that do deal with these provisions offer no support to DHCR's argument.

With regards to a tenant's private right of action under 42 U.S.C. § 1437f(t), the one case from this circuit that considers this issue directly found that a tenant does have a private right of action to enforce his or her right to remain in his apartment after the conversion of a building from a project based subsidy to enhanced vouchers under § 1437f(t). *Estevez v. Cosmopolitan Associates LLC*, 2005 WL 3164146 (E.D.N.Y. Nov. 28, 2005). In that case, the court noted that absent a private remedy, "there would be no readily available mechanism for enforcement or protection of the tenants' right to remain." *Id*. at

*9. Two federal courts of appeal have also recognized that tenants may enforce their rights under § 1437f(t) in federal court. *See Feemster v. BSA Limited Partnership*, 548 F.3d 1063 (D.C. Cir. 2008); *Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150 (9th Cir. 2011). *See also, Jeanty v. Shore Terrace Realty Ass'n*, 2004 WL 1794496 (S.D.N.Y. Aug. 10, 2004).

The grievance procedure provisions of 42 U.S.C. § 1437d(k) and the regulations that define the scope of those procedures also create rights enforceable under § 1983. *Saxton v. Housing Authority of City of Tacoma*, 1 F.3d 881, 884 (9th Cir. 1993) (finding that grievance procedure of 1437d(k) and regulations implementing it are enforceable under § 1983); *Farley v. Philadelphia Housing Authority*, 102 F.3d 697 (3d Cir.1996) (same); *Samuels v. District of Columbia*, 770 F.2d 184, 191 (D.C. Cir. 1985) (same); *Grillasca v. New York City Housing Authority*, 2010 WL 1491806 * 13 (S.D.N.Y. 2010) (finding that § 1983 provided remedy for claim that NYCHA violated 1437d(k) in termination proceeding of public housing resident).

Due Process is not satisfied by the availability of an Article 78 proceeding.

The cases cited by DHCR each feature a state actor failing to comply with established state procedures, a circumstance that Article 78 is designed to address. However, when the deprivation occurs as a result of state procedures, rather than "random acts" of state actors, "the availability of post-deprivation procedures will not, ipso facto, satisfy due process." *Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 880 (2d Cir. 1996); *see also Kraebel v. New York City Dept of Housing Preservation and Development*, 959 F.2d 395, 404 (2d Cir. 1992); *Hudson v. Palmer*, 468 U.S. 517, 532 (distinguishing between "random, unauthorized act by a state employee" from an "established state procedure").

Here, CVR's termination of Mr. Wims' voucher was not the result of one of its employees failing to follow established guidelines and procedures. Instead, it was the application of CVR's procedures themselves that resulted in Mr. Wims' deprivation. His voucher was converted to a transfer voucher as a result of River Park's failure to furnish him a lease. The transfer voucher then expired when Mr. Wims failed to move within the allotted time. Both of these actions were taken in accordance with the requirements of the voucher program, thus an action for mandamus would not address the harm done to Mr. Wims. This, coupled with the fact that there was no quasi-judicial agency determination to challenge (a fact admitted by CVR in the parties' joint letter dated November 13, 2015), rendered Article 78 useless as post-deprivation remedy.

Respectfully submitted,

/s/________________________

Robert G. Hammond, Esq.